

FOR ARGUMENT

No. 94-23

Supreme Court, U.S.  
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In The  
**Supreme Court of the United States**  
October Term, 1994

CITY OF EDMONDS,

*Petitioner,*

v.

WASHINGTON STATE BUILDING  
CODE COUNCIL, et al.,

*Respondents,*

and

UNITED STATES OF AMERICA

Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

PETITIONER'S REPLY BRIEF ON THE MERITS

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**QUESTION PRESENTED**

Is traditional single-family zoning patterned on the decisions of the United States Supreme Court exempt from coverage under the Fair Housing Act Amendments as a reasonable local restriction on the maximum number of occupants permitted to occupy a dwelling where there is no evidence of an intent to discriminate against the disabled and reasonable provision is made in other zoning districts for group home uses?

## PARTIES TO THE PROCEEDING

City of Edmonds, Washington  
 United States of America  
 Oxford House-Edmonds  
 Oxford House, Inc.  
 Herb Hamilton  
*Parties Dismissed<sup>1</sup>*

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<sup>1</sup> The following original parties have been dismissed by order of the District Court: Washington State Building Code Council; City of Everett, Washington; Oxford House-Hoyt; United States - Department of Housing and Urban Development; Jack Kemp and Richard L. Bauer.

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## SECTION I. STATEMENT OF REPLY ARGUMENT

The federal courts have deferred to local wisdom in the creation of zoning classifications as a reasonable exercise of local police powers since zoning was first reviewed by this Court in *Euclid* in 1926. Such an exercise of traditional police power carries with it a strong presumption against federal preemption. This presumption should be considered by this Court as it determines the plain meaning of the exemption to the Fair Housing Act Amendments ("FHAA") created by 42 U.S.C. § 3607(b)(1) ("the exemption").

Respondents assert that the exemption to the FHAA for reasonable local occupancy limits should be strictly construed due to the nature of the FHAA as a remedial statute. There is a stronger, more applicable history of federal deference to local zoning powers to which this Court should adhere. The Court prescribed preemption of state and local police power regulations absent "strong," "unambiguous" statutory language stating Congress' intent. From its inception, local zoning has been categorized by this Court as an exercise of police power. There is a strong tradition of deference to local zoning by the federal courts at all levels. The FHAA contains both an expressed preemption of local zoning laws which conflict with the Act as well as an exemption for reasonable local occupancy limits. Therefore, Petitioner believes that this Court should apply the presumption against preemption of traditional state powers and focus on the plain meaning of exemption.

Respondents United States and Oxford House disagree as to whether the meaning of the exemption created

42 U.S.C. § 3607(b)(1) is clear. Regardless both resort not only to the Committee Report but to the individual comments of legislators. Such passing comments whether by members of Congress in debate or a legislation's sponsor are neither controlling nor instructive in light of the plain meaning of the exemption.

The Briefs of Amicus Curiae in support of the Respondents' position raise many valid policy considerations. Such policy considerations are for Congress, however, and not the Courts because they are at odds with the plain meaning of the exemption.

The policy arguments of Respondents and their Amicus Curiae concern hypotheticals in favor of worthy programs established for the benefit of recovering drug addicts, alcoholics, the elderly, and other groups of disabled persons. Their concerns and their hypotheticals are misplaced. This is not a case of exclusionary zoning but of reasonable classification. Group homes of a sufficiently large size are analogous to institutional uses such as hospices and nursing homes and should be so categorized. So long as a community adequately provides in its zoning scheme for group home uses, it should be free to continue the traditional classification of a single-family zone.

Respondents mistake the amount of single-family housing available for rent in Edmonds. Oxford House confuses the issue further by attempting to evaluate a local zoning scheme based solely upon specific economic element of its own particular program, in this case, utilization of a rental home. The disabled buy as well as rent homes and so long as residences are equally available to

the disabled, traditional zoning and use classification should be exempt from FHAA coverage.

Respondents and their Amicus Curiae attempt to create a distinction regarding use and occupancy regulations that has never been recognized by the federal courts. Local zoning schemes depend on the interplay of density requirements which limit the use of structures and occupancy limits on the number of persons which may occupy a given room or floor space within the structure. To attempt to separate legitimate police power tools contained within a common zoning scheme ignores the standard maxim of interpretation that a zoning ordinance should be construed broadly and as a whole in order to effectuate its purpose.

Respondents and their Amicus Curiae raise a variety of policy issues which are often conflicting. While the States' Attorneys General strongly urge the Court to intervene on behalf of various state programs, each state has the ability to restrict or preempt local zoning powers. Respondents raise the same argument with respect to an ambiguous Washington State statute which has yet to be the subject of scrutiny by the Washington courts. Given the violations asserted by the Respondents, all of which occurred before the date of enactment of the cited state statute, the issue before this Court is neither moot nor relevant to this Court's decision.

The FHAA grants rights to the disabled. The rights of citizenship must always be balanced against the responsibilities of citizenship. In this case, a citizen's responsibilities include complying with the reasonable exercises

of local police power including reasonable occupancy limits established by local zoning laws.

The traditional federal deference to local zoning ordinance should be continued. As Justice Marshall has stated, the federal courts should not become the zoning appeal boards of last resort. The plain meaning of the FHAA exemption includes the type of reasonable zoning regulations approved by the Court in its decisions and in place in communities throughout the country. While Respondents cannot agree between themselves whether the plain meaning of the statute controls, there is certainly not the "strong" nor "unambiguous" statement necessary to preempt local zoning laws and change 70 years of federal deference to local planning.

## SECTION II.

### A. Standard for Review of Exemption

The Respondents urge this Court to narrowly construe the exemption created by 42 U.S.C. § 3607(b)(1) citing the maxim of statutory construction that an exemption to a remedial statute should be narrowly construed. There is an older, stronger line of federal authority which will not permit preemption of a traditional area of local police power regulation absent a Congressional statement of intent in strong unambiguous language. There is a "presumption against the preemption of state police power regulations." *Cipollone v. Liggett Group, Inc.*, 120 L.Ed.2d 407, 424 (1992). This Court stated the rule in its decision in *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218 (1947), (companion case *Rice v. Board of Trade*, 331 U.S. 247 (1947):

The historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

*Rice*, 331 U.S. at 230. This Court has required "strong" and "unambiguous language" in order to overcome this presumption when preemption is not expressly provided. *Rice*, 331 U.S. at 234.

Since its decision in *Village of Euclid v. Ambler*, this Court has classified local zoning as an exercise of state and local police power. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). *Euclid* established a strong tradition of deference to local zoning. As Justice Marshall stated in his dissent in *Village of Belle Terre v. Boraas*:

I am in full agreement with the majority that zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. I therefore continue to adhere to the principal of *Euclid v. Ambler Realty Company*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114, 54 ALR 1016 (1926), that deference should be given to governmental judgments concerning proper land use allocation. That deference is a principal which has served this Court well and which is necessary for the continued development of effective zoning and land-use control mechanisms. Had the owners alone brought this suit alleging that the restrictive ordinance deprived them of their property or was an irrational legislative classification, I would agree that the ordinance would have to be sustained. Our role is

not and should not be to sit as a zoning board of appeals.

*Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974).

The exemption created by 42 U.S.C. § 3607(b)(1) must be seen as opening the door to local action. *Rice v. Board of Trade*, 331 U.S. 247, 254, n6 (1942). ("Congress by granting the Board of Trade freedom to regulate within this narrow field has by that very act negated any inference that the federal government has preempted it by requirements of its own.") The question becomes whether the Act as a whole contains the type of "strong" and "unambiguous" language necessary for this Court to find a preemption of traditional zoning powers. As this Court has more recently stated:

If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.

*CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993). Given the general preemptive nature of the statute (42 U.S.C. § 3615) and the exemption created, application of the plain meaning rule without the restrictive limitation urged by Respondents is appropriate.

In this context, Congress' use of the word "any" in the exemption is particularly instructive. "Nothing in this subchapter limits the applicability of any reasonable local . . . restriction regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1). Respondents gloss over the use of "any" and, in effect, request this Court to ignore it. Statutory

interpretation requires that every word in the statute be afforded its reasonable meaning. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Inhabitants of Montclair TP, County of Essex v. Ramsdell*, 107 U.S. 147, 152, (1883)). Given the presumption against a preemption of local and state police powers, the limited scope of preemption under the FHAA and the creation of an exemption to certain exercises of state and local police power, the use of the word "any" as a broad inclusive term is critical to the Court's analysis.

#### B. Comments of Individual Legislators

If the Court finds the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 187, n33, (1978), (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60, (1930)). The plain meaning rule coupled with the presumption against preemption of local police power regulation and both rules' emphasis on plain meaning requires close focus on the exemption. Petitioner's Brief on the Merits addressed the plain meaning of the FHAA exemption. Respondents themselves disagree as to whether the exemption has a plain meaning. Brief of United States at 17; Brief of Oxford House at 26. Respondent United States of America beginning at page 31 of its Brief relies extensively on comments of individual legislators. Applying a plain meaning rule in light of the unambiguous language utilized in the exemption, there is no need to go to the legislative history. Should the Court review the Committee Report, it is clear that its inquiry should end there:

We have eschewed reliance on the passing comments of one member [citation omitted] and casual statements from the floor of debates.

*Garcia v. United States*, 469 U.S. 70, 77 (1984), *reh'g denied*, 469 U.S. 1230 (1985).

The contemporaneous remarks of a sponsor of legislation are not controlling in analyzing legislative history. *Wineberger v. Rossi*, 465 U.S. 25, 35, n15 (1982) (citing *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979)). This longstanding rule of construction is particularly applicable when construing a statute like the FHAA that partially preempts local regulation and then exempts certain state and local police power regulations.

### C. Any Reasonable Occupancy Limitation

Zoning codes are broadly interpreted by the Washington State courts as a whole in order to effectuate their purpose and provide emphasis and meaning to each provision of such a code. *Wiggers v. Skagit County*, 596 P.2d 1345 (Wash. Ct. App. 1979); *State ex rel. Edward Meany Hotel, Inc. v. City of Seattle*, 402 P.2d 486 (Wash. 1965). As Petitioner notes in its Brief on the Merits, the definition of family works in concert with the Uniform Housing Code to regulate both the use of lots and buildings and the occupancy of individual rooms within the building. The census data provided indicates that the average family size in 1990 in the City of Edmonds was 2.4 residents, down from prior census data. *Jt. App.* at 110. The reasonableness, then, of regulating only consensual non-

family living arrangements is apparent. "[T]he circumstances surrounding the enactment of legislation are relevant to its construction." *Federal Deposit Ins. Corp. v. Isham*, 777 F. Supp. 828, 831 (D. Colo. 1991) (citing *Commissioner of Internal Revenue v. Engle*, 464 U.S. 206 (1984)); see, also, *Pittsburgh & Midway Coal Min. Co. v. Yazzie*, 909 F.2d 1387 (10th Cir.) *cert. denied*, 498 U.S. 1012 (1990) (demographic information relevant to legislative action).

Respondents and their Amicus Curiae assert that consensual living arrangements of disabled persons in group homes are the functional equivalent of a family unit. Brief of Oxford House at 5; Brief of Amicus Curiae American Planning Association at 16. The descriptions of the program contained in Oxford House's Brief, as well as the description of senior adult group homes in the Brief of Amicus Curiae American Association of Retired Persons, show the institutional nature of these uses. Residents at Oxford House come, go and are expelled. Brief of Oxford House at 5-6. The program is self-perpetuating without the limitations inherent in a family unit and the stability provided by familial relationships. There are no bonds other than the common link provided by recovery from addiction and the need to share expenses.

As Oxford House's Brief notes, the stay of residents range from months to a few years, certainly not the stability inherent in a lifelong family relationship. Brief of Oxford House at 6. The average stay is 13 months. *Id.* at 6. Group homes for elderly residents frequently provide 24-hour care on a long term basis. Brief of Amicus Curiae American Association of Retired Persons at 17. At some point, these uses are indistinguishable from nursing

homes and small hospices or hospitals. The line between the hospital or nursing home in which patients are afforded full-time professional care and a group home in which a changing clientele of persons also receive 24-hour professional care is certainly not clear and in no way the equivalent of a family unit.

Respondents and Amicus Curiae American Planning Association rely in part upon a figure that only three percent of housing is available for the proposed group home use in the City of Edmonds.<sup>2</sup> Their use of the figure

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<sup>2</sup> The difference in the figure used by the Petitioner and Respondents is based upon what housing universe the 258 properly zoned rental homes are compared. Respondents compare this number of rental homes to the total number of housing units in the City of Edmonds. The City compares the number to the total number of single family homes in the properly zoned portions of the City. Rather than compare 258 to the thousands of housing units in the City, the City believes it is more appropriate to judge whether a reasonable search by the Respondent could have resulted in a properly zoned location for the group home use. In fact, the percentage of rental units in properly zoned areas of the City and the vacancy rate cited in Petitioner's Brief on the Merits at pp. 27-28 are very similar to the percentage of rental homes and vacancy rates in the state as a whole. U. S. Department of Commerce Economic Statistics Administration Bureau of the Census, General Housing Characteristics - Washington 1990 *Census of Housing*, 1990CH-1-49, tbl. 28, at 78 (1990).

The figure is also misleading in that it presumes that the analysis of whether the City's zoning code is exempt depends upon the individual institutional characteristics of the treatment program of one nonprofit organization. For example, a private foundation could purchase a home and in turn rent it to the individuals in recovery and avoid any shortage of rental homes. The characteristics of the Oxford House program become the tail that wags the dog and leads to Respondent's argument that

underscores the institutional nature of the Oxford House use. Adopting this argument would require local communities to structure their entire zoning structure around the institutional needs of one nonprofit organization.

The Edmonds' ordinances provide for both group homes and other institutional uses in the various zones of the City. *Jt. App.* at 234, 239; Exhibit 1. The City's ordinance is not an exercise in exclusionary zoning but rather the reasonable classification of different occupancies and uses which is inherently a part of a zoning scheme. The reasonableness of classifying a use, such as a rooming house separate from the single family residential use, because of its potential for increased urbanized impacts was first recognized in *Euclid* and reaffirmed in *Belle Terre. Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). Given that the City's ordinance provides reasonable classifications based upon use, size and occupancy with a place in all zoning districts other than the single family zone for group homes for the disabled, this Court should continue its tradition of deferring to local zoning wisdom.

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the City has unreasonably restricted their housing opportunities. Factually, rental housing opportunities are limited already by the size of structures available for rent, the rent charged in various localities, the vacancy rate at any particular time of year and a wide variety of other socio-economic circumstances that affect all renters, disabled or otherwise equally. These are not characteristics of the City's zoning code. What is important is that there are a large number (258) of rental homes available within properly zoned locations in the City.

It is asserted without supportive reasoning that residential treatment would be undermined by the City's zoning scheme. As has been noted, the City is a bedroom community with different residential zones. The mixed use multi-family residential zones of the City are comprised of homes, apartments, and small businesses identical to the site so strongly defended by Oxford House in Cherry Hill, New Jersey. *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992).

**D. Wash. Rev. Code 35A.63.240 (1994)**

In 1993, the Washington State Legislature amended the Washington Discrimination Act to incorporate the Fair Housing Act and FHAA. 1993 Wash. Laws, Ch. 69. During the same legislative session, the legislature also enacted the zoning provision referenced in the briefs of Oxford House and the United States. 1993 Wash. Laws, Ch. 478, § 21. No Washington appellate case has considered the impact of Wash. Rev. Code 35A.63.240 (1994) and no action is pending in any Washington court relating to interpretation of the provisions. Only one state agency has issued a regulation regarding the provision and that merely restates the statute. Wash. Admin. Code § 365-195-860 (Supp. 1993).

Wash. Rev. Code 35A.63.240 (1994) states:

No city may enact or maintain any ordinance, development regulation, zoning regulation or official control, policy, or administrative practice which treats a residential structure occupied by persons with handicaps differently than a similar residential structure occupied by a family or

other unrelated individuals. As used in this section, "handicaps" are as defined in the Fair Housing Amendments Act of 1988 (42 U.S.C. § 3602).

This paragraph is a clumsy paraphrase of comments of The Joint Committee Report. H.R. Rep. No. 711, 100th Cong., 2nd Sess. 23 (1988), reprinted in 1988 U.S.C.C.A.N. 2173. The reference in the state statute to residential structures confuses rather than clarifies the intent of the state legislature, leaving the intent and impact of the Washington statute far from certain.

Clarification by this Court of the obligations of the parties under the Fair Housing Act would benefit resolution of the state issue. The incorporation of state statutes parallel to the Fair Housing Act and FHAA and the contemporaneous enactment of Wash. Rev. Code 35A.63.240 (1994) clearly evidences an intent by the state of Washington to incorporate the Fair Housing Act and FHAA. The obligations of a municipality under state statute will necessarily parallel its federal obligations under the FHAA. Therefore, clarification of this issue would not only solve a national purpose by resolving a conflict between the circuits but also provide guidance to the state courts in interpreting and applying the state enactments.

Irrespective of any potential application or prospective impact of Wash. Rev. Code 35A.63.240, on the validity or interpretation of Edmonds' zoning ordinance, questions remain as to whether a violation of the FHAA occurred. This Court recognizes that even if one of several issues is moot, the remaining live issues satisfy the

case controversy requirement of Article III. *Powell v. McCormack*, 395 U.S. 486 (1969).

The Federal Government's complaint and Oxford House's counterclaim predate Washington's statutory amendment and both allege FHAA violations and request damages and penalties under the Act. So long as the potential for the assessment of damages and penalties against the City of Edmonds exists, all parties have a concrete interest in a final resolution of whether the Edmonds Community Development Code falls within the Fair Housing Act's exemption as a reasonable limitation on the maximum number of occupants. See, e.g., *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978); *Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, Freight Handlers, Exp. and Station Employees*, 466 U.S. 435 (1984). Consequently, the FHAA claims propounded by the Federal Government and Oxford House preclude a finding of mootness.

#### E. Rights and Responsibilities of the Disabled

The arguments of Respondents and many of their supporting Amicus Curiae assume that the rights of the disabled would be irretrievably impacted by subjecting them to the same responsibilities required of every citizen who rents or uses a home in the majority of communities throughout the land. Respondent Oxford House's Brief at 24 cites the Congressional findings contained at 42 U.S.C. § 6000(a)(9) (Supp. 1994). These findings were a part of the amendment of the Development Disabilities and Assistance and Bill of Rights Act contained in Pub. L. No.

98-527. As Respondent Oxford House notes, these findings were within Congressional knowledge at the time it extended Fair Housing Act rights to disabled persons in 1988. Petitioner City of Edmonds agrees that this statement of national policy is of interest as this Court analyzes this case. Those findings state:

[i]t is in the national interest to offer persons with development disabilities the opportunity, to the maximum extent feasible, to make decisions for themselves and to live in typical homes and communities where they can exercise their full rights and responsibilities as citizens.

42 U.S.C. § 6000(a)(9) (Supp. 1994). This Congressional finding is critical in two respects. First, Congress finds that disabled persons should live in typical homes. A typical home in a single-family neighborhood is not comprised of 10 or 12 recovering drug addicts and alcoholics, each working and pooling his or her resources in order to maintain the group home as an institution and to transition back into the mainstream of society. Congress goes on to note its desire for mainstreaming into a typical "community." By distinguishing between a typical home and a community, Congress acknowledges that institutional uses can be located within different zones of a city. Such an exercise is a traditional function of local government – to classify different uses in a reasonable fashion and assign the uses an appropriate place within the community based upon the occupancy of various structures, the potential density of the zone, and the overall needs of the local community.

Secondly, and perhaps most importantly, Congress, as it began the process of providing for assistance to and

a bill of rights for persons with development disabilities, recognized that as persons with developmental disabilities exercised the opportunity to live in "typical homes and communities," they must do so in a way that will allow them to exercise both their full rights and accept their full "responsibilities as citizens."

Congress, therefore, recognized the basic fact of citizenship that rights come with responsibilities. Persons with disabilities shall be afforded full opportunity to live in the mainstream of society. This principle does not require that institutional uses, such as group homes or consensual living arrangements of renters voluntarily grouped together by reason of their disability and provided by their political charter with perpetual life, cannot be assigned by reasonable zoning classifications to appropriate residential zones of a city as a limitation on occupancy. Such classification must be reasonable, but it is the type of local zoning decision to which the federal courts have traditionally deferred. The language of the FHAA does not overcome the historic presumption in favor of the local exercise of zoning police powers and the plain meaning of the exemption clearly embraces such an exercise.

Police powers define everyday citizen obligations such as where to park a car, how fast that car may be driven and how property can be used. Such obligations are controlled by local laws enacted with knowledge of unique local conditions including topography, climate, the local economy and similar factors which help define the singular nature of a community. These factors are uniquely within the province of local officials. Every citizen should be held to obedience of reasonable exercises

of the police power and the federal courts should continue their deference to local decision making so long as the police power is reasonably exercised.

### SECTION III. CONCLUSION

Petitioner respectfully requests that this Court apply the plain meaning of 42 U.S.C. § 3607(b)(1) and exempt the City of Edmonds' single family zoning structure from the FHAA.

Respectfully submitted,

W. SCOTT SNYDER

February 1995